Supreme Court, U. S.
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No. 74-1265

In the Supreme Court of the United States

OCTOBER TERM, 1974

ALLEN J. ZIMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the magistrate did not comply with Rule 11, Fed. R. Crim. P., in accepting his plea of guilty.

Petitioner pleaded guilty before a magistrate in the United States District Court for the Western District of Missouri to a charge of careless and imprudent driving within a military reservation, in violation of 18 U.S.C. 13 and §304.010 of Vernon's Ann. Mo. Stat. He was convicted and sentenced to a fine of $300 and to imprisonment for twenty days. The sentence of imprisonment was suspended and petitioner was placed on probation for three months, with a condition to insure payment of the fine within a specified period. The district court affirmed with an opinion (Pet. App. B). The court of appeals affirmed without opinion (Pet. App. A).

Petitioner, represented by retained counsel, waived his right to a jury trial and to a trial before the district court and consented, after a full explanation of his rights, to a trial before the magistrate (Pet. App. D 7-9). After the information had been read to him, petitioner stated that he understood the charges. The magistrate told him that the maximum punishment was a fine of $1,000, or one year's imprisonment, or both. Petitioner stated that no threats or promises had been made to induce his plea; that he understood he had a right to a full trial and that his guilty plea waived that right; and that on June 24, 1974, he operated a motor vehicle in a careless and imprudent manner by weaving back and forth across a designated center line of the public road on which he was traveling (Pet. App. D 9-10). The magistrate accepted his guilty plea. Petitioner waived a presentence investigation and his right of allocution, counsel for both parties declined to make any statement, and the magistrate thereupon imposed sentence (Pet. App. D 10).

In affirming, the district court held that petitioner was fully advised of the nature of the charge and the consequences of his plea, that the plea was supported by a factual basis, and that the sentence imposed did not constitute an abuse of discretion (Pet. App. B).

1. Petitioner claims that his guilty plea was improperly induced in light of his attorney's advice "to plead to the reduced charge as the fine would probably not exceed $50"[1] and the misstatement by the magistrate that the maximum punishment he faced was a $1,000 fine and/or one year's imprisonment. In fact the maximum punishment under Missouri law was a $500 fine and/or one year's imprisonment (Pet. 5-6).

[1]Apparently petitioner had originally been charged with drunken driving (Pet. 5).

Disappointed hopes as to what the sentence might be, based on the estimate of counsel, furnish no ground for setting aside a sentence. *Wheeler* v. *United States*, 468 F.2d 244, 245 (C.A. 9); *Swanson* v. *United States*, 304 F.2d 865 (C.A. 8); *Domenica* v. *United States*, 292 F.2d 483 (C.A. 1). Nor was the magistrate's overstatement of the maximum fine reversible error. The purpose of the requirement that the court inform a defendant of the penalties he faces is to forewarn him of all possible consequences arising from a guilty plea so that he will proceed with caution before waiving his right further to contest his guilt. Overstating the maximum fine could only have increased petitioner's caution. Cf. *Limon-Gonzalez* v. *United States*, 499 F.2d 936, 937 (C.A. 5); *United States* v. *Woodall*, 438 F.2d 1317 (C.A. 5), certiorari denied, 403 U.S. 933. As the fine imposed was well within either limit, any error was harmless beyond a reasonable doubt.

2. Petitioner also urges that the record fails to show a factual basis for the guilty plea inasmuch as neither the arresting officer's report nor the Military Police report described the road on which petitioner swayed back and forth or indicated whether danger to life, limb or property was caused (Pet. 11) (§304.010, Vernon's Ann. Mo. Stat.). Petitioner's own statement to the magistrate that he was weaving back and forth across the center line, however, and the evidence that he was driving under the influence of liquor,[2] was sufficient to establish the elements of the offense and a factual basis for the plea of guilty. Petitioner's reply to the court's inquiry attested to his understanding of the charge. Cf. *McCarthy* v. *United States*, 394 U.S. 459, 471. The plea of guilty was properly accepted.

[2]In a sworn statement, a Fort Leonard Wood military policeman attested that after stopping petitioner's car he smelled a strong odor of alcohol on petitioner's breath. A Breathalizer test showed .08% blood alcohol (Pet. App. D 14-15).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.